TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 109.

COMMERCIAL NATIONAL BANK OF PORTLAND, PLAINTIFF IN ERROR,

vs.

HENRY WEINHARD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED AUGUST 9, 1902.

(16,040.)

(18,640.)

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INDEX.

	Original.	Print.
Return to writ of error	*a*	1
Writ of error	*b*	1
Petition for writ of error	*f*	3
Order allowing writ of error	*h*	3
Bond on writ of error	*j*	4
Assignment of errors	*n*	6
Citation	*r*	7
Acceptance of service of citation	*s*	8
Caption	*u*	8
Transcript from circuit court of Multnomah county	1	8
Complaint	1	9
Motion to strike parts of complaint	5	11
Order on motion to strike	6	12
Demurrer to complaint	7	12
Order overruling demurrer	8	13
Answer	9	13
Demurrer to answer	38	27
Motion to strike parts of answer	40	28
Order denying motion to strike parts of answer, sustaining demurrer to answer, and granting leave to amend	42	29

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 7, 1903.

	Original.	Print
Stipulation to try cases together, &c	44	30
Order beginning hearing	50	34
Order continuing hearing	51	34
Order continuing hearing	52	34
Order continuing hearing	53	35
Order continuing hearing	53	35
Order continuing hearing	54	35
Order continuing hearing	55	36
Order taking cause under advisement	55	36
Motion for rehearing	56	36
Motion as to findings of fact	57	37
Order taking motion for rehearing under advisement	58	37
Order taking motion as to findings of fact under advisement	59	38
Order allowing exception upon decision that plaintiff was not entitled to interest	59	38
Findings of fact	60	39
Conclusions of law	61	39
Judgment	62	39
Bill of exceptions	63	40
Plaintiff stands on pleadings	63	40
Motion for nonsuit	63	40
Plaintiff's statement	65	41
Motion for nonsuit denied	65	41
Opinion	65	41
Motion as to findings of fact	70	44
Judge's certificate to bill of exceptions	71	44
Acceptance of service of bill of exceptions	71	44
Notice of appeal	72	45
Undertaking on appeal	73	45
Stipulation as to time to file transcript on appeal	75	46
Order as to time to file transcript on appeal	76	47
Clerk's certificate to transcript on appeal	77	47
Clerk's certificate as to bond on appeal	78	47
Endorsement on transcript	79	48
Opinion	80	48
Judgment	87	52
Clerk's certificate	88	53

a In the Supreme Court of the State of Oregon, *ss:*

HENRY WEINHARD, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, OREGON, Defendant and Appellant.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the above entitled cause, with all things concerning the same.

July 22nd, 1902.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

b In the Supreme Court of the United States.

COMMERCIAL NATIONAL BANK OF PORTLAND, Plaintiff in Error,
vs.
HENRY WEINHARD, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Oregon, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Oregon before you or some of you, being the highest court of said State in which a decision could be had in the said action between Henry Weinhard, plaintiff and respondent, and defendant in error, and The Commercial National Bank of Portland, a corporation, defendant and appellant, and plaintiff in error, wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege and exemption specially set up and claimed under such statute; a manifest error hath happened to the great damage of the said Commercial National Bank of Portland, plaintiff in error, as by its complaint appears; and we being willing that error if any hath been, should be duly corrected, and full and speedy justice
c done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington, within sixty days

from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24th day of June, 1902

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN,
Clerk of the Circuit Court of the United States for the District of Oregon,
By G. H. MARSH,
Deputy Clerk.

Allowed by
R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

d STATE OF OREGON, *County of Multnomah,* } ss:

Due and legal service of the foregoing writ of error by duly certified copy thereof as required by law is hereby admitted and accepted at Portland, Oregon, this 26th day of June, 1902.

THOS. O'DAY,
Of Attorneys for Defendant in Error, Henry Weinhard.

STATE OF OREGON, *County of Marion,* } ss:

Due and legal service of the foregoing writ of error by duly certified copy thereof as required by law is hereby admitted and accepted at Salem, Oregon, this 25th day of June, 1902.

J. J. MURPHY,
Clerk of the Supreme Court of Oregon.

e [Endorsed:] No. —. In the Supreme Court of the United States Commercial National Bank of Portland, plaintiff in error, *vs.* Henry Weinhard defendant in error. Writ of error. Filed June 27 1902 J. J. Murphy, clerk. By —— ——, deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for plaintiff in error.

f In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Plaintiff and Respondent,
vs.
THE COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant and Appellant.
} Petition for Writ of Error.

To the Honorable Robert S. Bean, chief justice of the supreme court of the State of Oregon:

And now comes the Commercial National Bank of Portland, a corporation, appellant, by Harrison G. Platt and Robert T. Platt and E. S. Pillsbury, its attorneys, and says that on or about the 3d day of May 1902, the said supreme court of the State of Oregon rendered a judgment in the above entitled cause in favor of the above named plaintiff and respondent and against defendant and appellant, as will appear by reference to the record and proceedings in said cause, in which judgment and decision and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of defendant and appellant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, defendants prays that a writ of error issue in this behalf returnable into the Supreme Court of the United States for the correction of error complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States.

E. S. PILLSBURY,
HARRISON G. PLATT,
ROBERT T. PLATT,
Attorneys for Petitioner.

g [Endorsed:] No. —. In the supreme court of the State of Oregon Henry Weinhard plaintiff & respondent *vs.* Commercial National Bank of Portland, defendant & appellant Petition for writ of error. Filed June 25 1902 J. J. Murphy clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for defendant.

h In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant and Appellant.

Order Allowing Writ of Error.

This 25th day of June, 1902, came the defendant and appellant by its attorneys Harrison G. Platt and Robert T. Platt and E. S. Pillsbury, and filed herein and presented to the court its petition

praying for the allowance of a writ of error intended to be urged by it, praying also that transcript of the record and proceedings and papers upon which the decision and judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof the said writ is hereby allowed upon the said appellant giving bonds according to law in the sum of $500.

R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

i [Endorsed:] No. —. In the supreme court of the State of Oregon. Henry Weinhard, plaintiff & respondent, *vs.* Commercial National Bank of Portland, defendant & appellant. Order allowing writ of error. Filed June 25 1902 J. J. Murphy clerk. By —— ——, deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon, attorneys for defendant.

j In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant and Appellant.

Know all men by these presents: That Commercial National Bank of Portland, the plaintiff in error in the above entitled cause on writ of error to the Supreme Court of the United States, as principal, and R. Lea Barnes, and John E. Miles, as sureties, are held and firmly bound unto Henry Weinhard, plaintiff and respondent in the supreme court of the State of Oregon and defendant in error on writ of error to the Supreme Court of the United States, in the full sum of five hundred dollars ($500.00) to be paid to the said Henry Weinhard, his certain attorneys, executors, administrators, and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25th day of June, 1902.

Whereas lately, at a session of the supreme court of the State of Oregon, in an action pending in said court between Henry Weinhard, plaintiff and respondent, and Commercial National Bank of Portland, defendant and appellant, a final judgment was rendered against the said Commercial National Bank of Portland, and the said Commercial National Bank of Portland having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of said supreme court of the
k State of Oregon to reverse the judgment in the aforesaid action, and a citation directed to said plaintiff and respondent, citing and admonishing him to be and appear at a session of the Supreme Court of the United States at Washington, within sixty days from the date hereof;

Now, therefore, the condition of this obligation is such, that if the said Commercial National Bank of Portland, plaintiff in error, shall prosecute said writ of error to effect, and answer all costs if it shall fail to make its said plea good, then this obligation to be void, else to remain in full force and virtue.

COMMERCIAL NATIONAL BANK
OF PORTLAND,
By HARRISON G. PLATT, *Attorney.*
R. LEA BARNES. [SEAL.]
JNO. E. MILES. [SEAL.]

Signed, sealed and delivered in presence of
HARRISON G. PLATT.

l STATE OF OREGON, }
County of Multnomah, } ss:

I, R. Lea Barnes, and I, John E. Miles, whose names are subscribed to the within undertaking as sureties, being duly sworn, each for himself, say:

That I am a resident and freeholder within the State of Oregon, and not an attorney or counselor at law, sheriff clerk or officer of any court, and am worth the sum of five hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

R. LEA BARNES.
JNO. E. MILES.

Subscribed and sworn to before me this 25th day of June, 1902.

[Seal of Harrison G. Platt, Notary Public, State of Oregon.]

HARRISON G. PLATT.
Notary Public for Oregon.

Approved June 25, 1902.

By R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

m [Endorsed:] No. —. In the supreme court of the State of Oregon Henry Weinhard plaintiff & respondent *vs.* Commercial National Bank of Portland defendant & appellant Undertaking Filed June 25th 1902 J. J. Murphy, clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for defendant.

n In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Plaintiff & Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant & Appellant.

Assignment of Errors on Writ of Error to the Supreme Court of the United States.

Now at this time comes The Commercial National Bank of Portland, defendant and appellant in the above entitled case, and plaintiff in error to the Supreme Court of the United States, by its attorneys Harrison G. Platt and Robert T. Platt and E. S. Pillsbury, and presents the following assignment of errors and prayer for reversal of the decision in the above entitled case in this court, by the Supreme Court of the United States:

First. The supreme court of the State of Oregon erred in holding the complaint herein good as against the demurrer thereto of defendant and in not sustaining said demurrer.

Second. The supreme court of the State of Oregon erred in sustaining plaintiff's demurrer to defendant's first, further and separate answer.

Third. The supreme court of the State of Oregon erred in sustaining plaintiff's demurrer to the second, further and separate answer of defendant.

Fourth. The supreme court of the State of Oregon erred in sustaining plaintiff's demurrer to the third, further and separate answer of defendant.

o Fifth. The supreme court of the State of Oregon erred in denying defendant's motion for a non-suit.

Sixth. The supreme court of the State of Oregon erred in holding that section 5205 Revised Statutes of the United States did not give defendant the right by action of its board of directors to levy an assessment to restore impaired capital stock.

Seventh. The supreme court of the State of Oregon erred in holding that the acts and proceedings of defendant in assessing the stock of plaintiff were not authorized by section 5205 United States Revised Statutes.

Eighth. The supreme court of the State of Oregon erred in holding that the acts and proceedings of defendant in selling the stock of plaintiff were not authorized by section 5205 United States Revised Statutes.

Ninth. The supreme court of the State of Oregon erred in holding that the assessment levied by the board of directors of defendant bank to make up the impairment in its capital stock under section 5205 United States Revised Statutes, was invalid and not within the power of the directors.

Tenth. The supreme court of the State of Oregon erred in hold-

ing that defendant bank wrongfully converted plaintiff's shares of stock.

Eleventh. The supreme court of the State of Oregon erred in awarding judgment in favor of plaintiff and against defendant
p and in not awarding judgment against plaintiff and in favor of defendant.

And by reason of the foregoing errors and holdings the appellant prays that said judgment may be reversed and that a mandate be entered directing that a judgment be entered in favor of defendant and plaintiff in error for its costs and disbursements and that it may be restored to all things which it has lost by reason of said judgment.

E. S. PILLSBURY,
HARRISON G. PLATT,
ROBERT T. PLATT,
Attorneys for Commercial National Bank of Portland, Oregon, Defendant and Appellant and Plaintiff in Error.

q [Endorsed:] No. —. In the supreme court of the State of Oregon Henry Weinhard plaintiff & respondent *vs.* Commercial National Bank of Portland defendant & appellant Assignment of errors. Filed June 25th 1902 J. J. Murphy clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for defendant.

r In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Plaintiff & Respondent and Defendant in Error,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant & Appellant and Plaintiff in Error.

UNITED STATES OF AMERICA, *District of Oregon*, } *ss*:

To Henry Weinhard, plaintiff and defendant in error, and to Thomas O'Day and L. H. Tarpley, your attorneys, Greeting:

Whereas, the Commercial National Bank of Portland, a corporation, has lately obtained a writ of error to the Supreme Court of the United States from a judgment rendered in the supreme court of the State of Oregon, in your favor and has given the security required by law, you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to said writ of error, wherein said Commercial National Bank of Portland is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ

of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert S. Bean, chief justice of the supreme court of the State of Oregon this 25th day of June, 1902.

[Seal Supreme Court, State of Oregon.]

R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

Attest: J. J. MURPHY, *Clerk.*

s UNITED STATES OF AMERICA, } ss:
District of Oregon, }

Due and legal service of the within citation is hereby admitted and accepted at Portland, Oregon, this 26th day of June, 1902.

THOS. O'DAY,
Of Attorneys for Plaintiff & Respondent, Henry Weinhard.

t [Endorsed:] No. —. In the supreme court of the State of Oregon Henry Weinhard, plaintiff & respondent, *vs.* Commercial National Bank of Portland, defendant & appellant Citation Filed June 27 1902 J. J. Murphy clerk. By —— —— deputy. Platt & Platt, attorneys at law, 405 and 407 Commercial block, Portland, Oregon. attorneys for defendant.

u *Transcript.*

HENRY WEINHARD, Plaintiff & Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant & Appellant.

Appeal from the circuit court, Multnomah county.

Before Hon. Alfred F. Sears, Jr., and Hon. Arthur L. Frazer, judges, sitting in joint session.

O'Day and Tarpley, attorneys for respondent.
E. S. Pillsbury and Platt & Platt, attorneys for appellant.

1 Be it remembered, that heretofore and on the 23rd day of February, A. D. 1899, there was filed in the office of the clerk of the circuit court for the county of Multnomah, a

Complaint

which is in words and figures as follows, to-wit:—

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department #—.

HENRY WEINHARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

The plaintiff complains of defendant and for cause of action alleges:—

That at all the times hereinafter stated the defendant was and still is a corporation, duly incorporated under the national banking laws of the United States and located at Portland, Oregon, engaged in a general banking business.

That for a long time before and until the time hereinafter mentioned, the plaintiff was lawfully possessed and was the owner of 100 shares of the capital stock of said defendant corporation, fully paid up, of the aggregate par value of $10,000.00.

2 That on or about October 5th, 1896, the board of directors of said bank, without any lawful authority therefor, adopted a series of resolutions recommending and requesting the Comptroller of the Currency to call for an assessment of 50 % on the capital stock of said bank, in accordance with the authority conferred upon him by sec. 5205 of the Revised Statutes of the United States, claiming that the capital stock of said bank had been impaired, and afterwards, on or about December 5, 1896, the Comptroller of the Currency, in compliance with the said request of said board of directors gave notice to the defendant association, that its capital stock had become impaired to an extent which made necessary an assessment thereon of $250,000.00 that being 50 % assessment on the face value of the capital stock of said defendant.

That thereafter and subsequent to the receipt of said notice, the board of directors of the defendant corporation, without any lawful authority therefor, passed a resolution as follows:—

"In accordance with the notice served upon this association, by the Comptroller of the Currency under date of December, 1896, an assessment is hereby levied upon the shareholders of this bank of 50 % or $50. per share payable at this bank on or before March 11th, 1897." And further resolved, "That the cashier of this bank be, and he is hereby authorized and instructed to serve upon each shareholder of the bank, a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail."

3 That the above resolution and all and each and every act of said board of directors was done without the authorization or direction of the stockholders of said bank, and no shareholders' or stockholders' meeting was held for the purpose of authorizing said assessment or determining what action, if any, should be taken with reference to the said notice for assessment, given by the Comptroller of the Currency as aforesaid.

That the amount of the assessment of the stock of this plaintiff, made by the board of directors as above set forth, was the sum of $5,000.00 and that thereafter, to-wit:—on or about the 5th day of May, 1897, said defendant association without lawful authority therefor, undertook to and did sell and dispose of said plaintiff's 100 shares of the capital stock of defendant for the purpose of paying said pretended and illegal assessment, this plaintiff having refused to pay the same, and denying the authority of said board of directors to levy said assessment; and this plaintiff alleges that under sec. 5205 of the Revised Statutes of the United States, the board of directors of said defendant had no authority or right to make said assessment on the stock or shares of this plaintiff, but said assessment could only be made by order of the shareholders of defendant at a shareholder's meeting and not otherwise and that said assessment is void.

That notwithstanding the premises and the want of authority on the part of said board to make said assessment and sale, said defendant proceeded to and did advertise and sell said 100
4 shares of stock of this plaintiff as hereinbefore stated, and did thereby convert same to the use and benefit of the defendant and did thereby unlawfully and without the consent of this plaintiff deprive the plaintiff of the use and possession of said stock and the proceeds thereof, and did thereby oust said plaintiff as a shareholder or stockholder of said defendant association to his damage in the sum of $10,000; that said sum of $10,000.00 was the reasonable value of said stock at the time of said wrongful sale and conversion by said defendant.

That by virtue of the wrongful act of said defendant association, this plaintiff ceased to be a shareholder in said bank, and ceased thereafter to participate in the profits and emoluments of said defendant.

Wherefore plaintiff prays judgment against said defendant for the sum of $10,000.00 with interest thereon from May 5, 1897, together with his costs and disbursements herein.

O'DAY AND TARPLEY,
Attorneys for Plaintiff.

STATE OF OREGON, }
County of Multnomah, } ss:

I, Henry Weinhard, being first duly sworn, depose and say that I am the plaintiff in the above entitled action; and that the foregoing complaint is true as I verily believe.

HENRY WEINHARD.

Subscribed and sworn to before me this 21st day of February, 1899.

HENRY WAGNER,
[SEAL.] *Notary Public for the State of Oregon.*

5 And afterwards, on the 14th day of March, 1899, there was filed in the office of said clerk, a

Motion to Strike Out Parts of Complaint

in words and figures as follows, to-wit:—

(Title.)

Comes now the defendant above named, appearing by Platt & Platt, its attorneys, and moves the court

First. To strike out all that portion of the complaint contained within lines twenty-four (24) and thirty-two (32) both inclusive of page one (1) thereof; on the ground and for the reason that the same is incompetent, irrelevant immaterial, sham, and frivolous;

Second. To strike out the following paragraph in line thirty-four (34) page one (1) and line one (1) page two (2) to-wit: "in compliance with said request of said board of directors," on the ground and for the reason that the same is incompetent, immaterial, irrelevant, sham and frivolous;

Third. To strike out all that portion of the complaint contained between the words "and this" line four (4) of page three (3) and the word "void" in line eleven (11) page three (3) thereof, on the ground and for the reason that the same is incompetent, redundant and a conclusion of law.

PLATT & PLATT,
Attorneys for Defendant.

6 STATE OF OREGON, }
County of Multnomah, } *ss:*

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 4th day of March, 1899, by receiving a copy thereof, duly certified to as such, by Robert Treat Platt one of the attorneys for defendant.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

And afterwards, on Tuesday the 14th day of March, A. D. 1899, the same being the 8th judicial day of the March term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now at this time, this cause coming on for hearing, on motion of defendant to strike out certain parts of plaintiff's complaint, plaintiff appearing by Thomas O'Day and George H. Williams, Esq., of his attorneys, and defendant appearing by Robert T. Platt, Esq., of Platt & Platt, its attorneys, and argument having been heard, and the court being fully advised, said motion is granted as to the
7 first and second parts thereof, and denied as to the third part; and in pursuance thereof all that portion of the complaint is hereby stricken out, contained between the lines twenty-four (24) and thirty-two (32), both inclusive, of page one (1) thereof; and the following paragraph in line thirty-four (34) of page one (1) and line one (1), page two (2), to-wit:—"in compliance with said request of said board of directors." And plaintiff is hereby given five days from and after the entry of this order within which to file an amended complaint herein.

(Signed) ARTHUR L. FRAZER, *Judge.*

Dated March 15th, 1899.

And afterwards, on the 13th day of April, 1899, there was filed in the office of said clerk, a

Demurrer

in words and figures as follows, to-wit:—

(Title.)

Comes now the defendant above named, appearing by Platt & Platt, its attorneys, and demurs to plaintiff's complaint on file herein, on the ground and for the reason that the same does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against this defendant.

PLATT & PLATT,
Attorneys for Defendant.

8 STATE OF OREGON, }
County of Multnomah, } ss:

Due service of the within demurrer is hereby accepted in Multnomah county, Oregon, this 13th day of April, 1899 by receiving a copy thereof, duly certified to as such, by Robert Treat Platt one of the attorneys for defendant.

O'DAY AND TARPLEY,
Attorneys for Plaintiff.

And afterwards, on Monday, the 8th day of May, A. D. 1899, the same being the 7th judicial day of the May term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

(Title.)

Now at this time this cause coming on for hearing upon defendant's demurrer to plaintiff's complaint, the same having been
9 heretofore argued and taken under advisement by the court, plaintiff appearing by Thomas O'Day, Esq., of his attorneys, and defendant appearing by Platt & Platt, its attorneys, and the court being at this time fully advised,

It is considered and ordered that said demurrer be and the same hereby is overruled and the defendant given five days from and after this date within which to file its answer to plaintiff's complaint.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on the 27th day of June, 1899, there was filed in the office of said clerk, an

Answer

in words and figures as follows to-wit:—

(Title.)

The defendant for answer to the complaint in the above entitled cause, admits, denies and alleges as follows:—

I. Denies that the board of directors of the defendant corporation ever at any time without any lawful authority therefor passed the resolution set forth in the said complaint or any resolution. And in this behalf the defendant alleges that on or about the 11th
10 day of December, 1896, the defendant received from the Comptroller of the Currency a notice which was and is in words and figures following,

"TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Dec. 5th*, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial National Bank, Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency

Now, therefore, notice is hereby given to said association under

the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department in the city of Washington and District of Columbia, this 5th day of December, A. D. 1896.

11 JAMES H. ECKELS,
Comptroller of the Currency.

To the Commercial national bank, Portland, Oregon.

And the said defendant further alleges that under and by virtue of section 5205 of the Revised Statutes of the United States, it thereupon became and was the duty of the said board of directors within three months after receiving from the Comptroller of the Currency the said notice that the capital stock of the defendant had become impaired to an extent which made necessary an assessment thereon of $250,000., either to collect the said sum of $250,000. by assessment upon the stockholders of the defendant *pro rata* for the amount of capital stock held by each, or to cause the defendant to go into liquidation under penalty of having a receiver appointed by the Comptroller of the Currency to close up the business of the defendant; and that under and by virtue of the said section 5205 of the Revised Statutes of the United States, the said board of directors was vested with the authority and power to determine whether the defendant should pay up the said sum of $250,000 by assessment upon the shareholders of the defendant as aforesaid, or to go into liquidation; and that pursuant to and in the exercise of the said authority and power, and not otherwise, the board of said directors, on or about the 14th day of December, 1896, passed the resolution which is set forth in the said complaint, and levied upon all the shareholders of the defendant an assessment of fifty per cent. of the par value of their stock or fifty dollars per share.

12 II. Admits that no shareholders' or stockholders' meeting was held prior to the time when the said resolution was passed for the purpose of authorizing the said assessment, or of determining what action, if any, should be taken with reference to the said notice of assessment given by the Comptroller of the Currency as aforesaid but denies that the said resolution was passed or that any act of the said board of directors was done without the authorization of the stockholders of the defendant corporation. And in this behalf, the defendant alleges that the directors constituting the said board were elected as such directors by the shareholders and stockholders of the defendant within one year prior to the said 14th day of December,

1896, and that the term of office for which said directors were elected had not expired on the said 14th day of December, 1896, and that by virtue of the said election, and under and by virtue of section 5145 of the Revised Statutes of the United States, the said board of directors was authorized and empowered by the stockholders of the defendant to pass the said resolution, and to levy the said assessment.

III. Admits that the plaintiff refused to pay the said assessment and that on or about the 5th day of May, 1897, the defendant undertook to and did sell and dispose of the plaintiff's one hundred shares of the capital stock of the defendant for the purpose of paying
13 the said assessment but denies that the defendant association without any lawful authority therefor undertook to or did sell or dispose of any share or shares of the capital stock of the defendant which belonged to the plaintiff, for the purpose of paying any pretended or illegal assessment or any assessment, or for any purpose or at all, and denies that the said assessment was pretended or illegal or that under section 5205 of the Revised Statutes of the United States the board of directors of said defendant had no authority or right to make the said or any assessment on the stock or shares of the plaintiff, and denies that under section 5205 or any section of the Revised Statutes of the United States, or under any law of the United States, said assessment could only be made by order of thd shareholders of the defendant at a shareholders' meeting and not otherwise, and denies that under section 5205 or any section, of the Revised Statutes of the United States, or under any law of the United States the said assessment or any part or portion thereof, was ever or now is void, or that under section 5205 or any section of the Revised Statutes of the United States or under any law of the United States, there ever was any want of authority on the part of the said board of directors to make said assessment and sale, or to make the said assessment, or to make the said sale.

IV. Denies that the defendant ever at any time proceeded to or did advertise or sell the said one hundred shares of stock of plaintiff or any shares of stock belonging to the plaintiff, except as stated
14 in this answer, and denies that the defendant ever at any time or at all unlawfully and without the consent of the plaintiff, or unlawfully, or without the consent of the plaintiff, deprived the plaintiff of the use and possession, or of the use or of the possession of the said stock, or of the proceeds thereof, or of any stock, or of any of the proceeds of any stock, or unlawfully and without the consent of the plaintiff, or unlawfully or without the consent of the plaintiff ousted the said plaintiff as a shareholder or stockholder of said defendant association, to his damage in the sum of ten thousand dollars, or ousted the said plaintiff as a shareholder or stockholder of said defendant association or caused the plaintiff damage in the sum of $10,000 or in any sum or at all.

V. Alleges that thereafter, to-wit: on the 17th day of December, 1896, the defendant caused notice in writing of the said resolution

passed by the said board of directors on the 14th day of December, 1896, and of the said assessment thereby levied upon the shareholders of the defendant, to be served upon the plaintiff and also upon each and every shareholder of the defendant; that prior to the 12th day of January, 1897, the said plaintiff and each and every stockholder of the defendant received, and had actual notice of the said resolution and of the said assessment; that the plaintiff failed and neglected to pay the said assessment or any part or portion
15 thereof, or to pay to defendant any sum of money whatever on account of the said or any assessment in pursuance of the said notice received by the defendant as aforesaid from the Comptroller of the Currency; that thereafter, to-wit, on the 18th day of March, 1897, at a meeting of the board of directors of the defendant which had been duly and regularly called and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which a quorum of the said board of directors was present and voted, the said board of directors passed a resolution wherein and whereby the said board of directors voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897, at 3:30 p. m., a sufficient amount of the said one hundred shares of the capital stock of the defendant belonging to the plaintiff to make the amount of said assessment upon the said one hundred shares of stock, to-wit: the sum of $5,000; that the said board of directors before the said sale gave due and legal notice thereof as required by the laws of the United States; that in pursuance of the said resolution the plaintiff's one hundred shares of the capital stock of the defendant were sold at public auction on the 5th day of May, 1897, at 3:30 p. m., at the banking house of the defendant in the city of Portland, State of Oregon, that at the said sale the defendant received for the said one hundred shares of stock the sum of $5,000.00 and no more; and that the whole number of the said one
16 hundred shares of stock was the least amount of the said one hundred shares of stock which would make the amount of the said assessment thereon.

VI. Alleges that under and by virtue of the laws of the United States, in such cases made and provided and particularly under and by virtue of section 5205 of the Revised Statutes of the United States the said board of directors was authorized and empowered to pass the said resolution which was passed on the 18th day of March, 1897, as aforesaid; and to make and cause to be made the said sale which was made on the 5th day of May, 1897, as aforesaid.

VII. Denies that the sum of ten thousand dollars was the reasonable value of the said one hundred shares of stock on the 14th day of December, 1896, or at any time thereafter, and denies that on the 14th day of December, 1896, or at any time thereafter, prior to the said sale, or at the time of said sale the said one hundred shares of stock were of any value whatever, and denies that the reasonable value of the said one hundred shares of stock at any time after the

said sale was greater than $5000.00. Denies that the plaintiff has been damaged by any act or acts of the defendant in the sum of $10,000 or in any sum or at all.

VIII. Denies that the said sale, or that the said conversion or that any sale, or any conversion, of the said one hundred shares of stock by the defendant was wrongful or that by virtue of any wrong-
17 ful act of the defendant association the plaintiff ceased to be a shareholder in said bank, or a shareholder of the defendant, or ceased thereafter or at any time to participate in the profits and emoluments or in the profits or in the emoluments of the defendant, and denies that any profits or emoluments have ever at any time since the 14th day of December, 1896, accrued to or been received by the defendant.

And for a first, further and separate answer and defence to plaintiff's complaint, the defendant alleges:

I. That on the said fifth day of December, 1896, the Comptroller of the Currency of the United States served a notice upon the defendant association which was and is in the words and figures following:

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Dec. 5th*, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial national bank Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency:

Now therefore, notice is hereby given to said association under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assess-
18 ment upon its shareholders, *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver shall be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the city of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKELS,
Comptroller of the Currency.

To the Commercial national bank, Portland, Oregon.

II. That said notice was received by the defendant association on the 11th day of December, 1896.

III. And that the said defendant further alleges that under and by

virtue of section 5205 of the Revised Statutes of the United States it thereupon became and was the duty of the said board of directors within three months after receiving from the Comptroller of the Currency the said notice that the capital stock of the defendant had become impaired to an extent which made necessary an assess-
19 ment of $250,000 thereon either to collect the said sum of $250,000 by assessment upon the stockholders of the defendant *pro rata* for the amount of the capital stock held by each, or to cause the defendant to go into liquidation, under penalty of having a receiver appointed the Comptroller of the Currency to close up the business of the defendant; and that under and by virtue of said section 5205 of the Revised Statutes of the United States the said board of directors was vested with the authority and power to determine whether the defendant should pay up the said sum of $250,000 by assessment upon the shareholders of the defendant as aforesaid, or should go into liquidation; and that pursuant to and in exercise of the said authority and power and not otherwise, the said board of directors on the 14th day of December, 1896, at a regular meeting of the board of directors of the defendant association duly and regularly called and held, a quorum being present unanimously passed the resolution which is set forth in the complaint, levying an assessment upon the shareholders of the association of fifty per cent. of the par value thereof or fifty dollars per share, payable at the banking house of the defendant association, on or before March 11th, 1897, and directing that the cashier of defendant association be authorized to serve upon each shareholder of defendant association a legal notice of the above assessment, by sending such notice to each shareholder's address by registered mail;

IV. Admits that no shareholders' or stockholders' meeting was held prior to the time when the said resolution was passed for
20 the purpose of authorizing the said assessment or of determining what action, if any, should be taken with reference to the said notice for assessment given by the Comptroller of the Currency as aforesaid, but alleges that the said resolution was passed and that every act of the said board of directors was done with and by the authorization of the stockholders of the defendant corporation. And in this behalf the defendant alleges that the directors constituting the said board were elected as such directors by the shareholders and stockholders of the defendant within one year prior to the said 14th day of December, 1896, and that the term of office for which the said directors were elected had not expired on the 14th day of December, 1896, and that by virtue of the said election, and under and by virtue of section 5145 of the Revised Statutes of the United States, the said board of directors was authorized and empowered by the stockholders of the defendant to pass said resolution, and to levy said assessment.

V. That thereafter, and on the 17th day of December, 1896, the defendant association acting by and through its cashier served notice on the plaintiff and each shareholder of the defendant association of said assessment by sending a certified copy of said resolution of said

board of directors through the United States mail, addressed to the plaintiff and each shareholder, at their regular addresses by registered mail, postage fully prepaid:

VI. That in and by the terms of said notice of the Comptroller of the Currency and the said resolution of said board of directors plaintiff was required to pay to defendant association fifty per cent. upon his said stock amounting to five thousand dollars, on or before the 11th day of March, 1897;

21

VII. That prior to the 12th day of January, 1897, the said plaintiff and each and every shareholder of the defendant received and had actual notice of the said resolution of the said assessment;

VIII. That plaintiff did not pay to defendant association the said assessment or any part or portion thereof or the said sum of five thousand dollars or any sum or sums whatsoever on or before the 11th day of March, 1897, and has never paid said sum or any part thereof; or paid to the defendant any sum of money whatever on account of the said or any assessment in pursuance of the said notice received by the defendant as aforesaid from the Comptroller of the Currency.

IX. That thereafter, to-wit, on the 18th day of March, 1897, at a meeting of the board of directors of the defendant which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which a quorum of the said board of directors was present and voted, the said board of directors passed a resolution wherein and whereby the said board of directors voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897, at 3:30 p. m., a sufficient amount of the said one hundred shares of the capital stock of the defendant belonging to the plaintiff to make the amount of the said assessment upon the said one hundred shares of stock, to-wit: the sum of $5000.00; that the said board of directors before the said sale gave due and legal notice thereof as required by the laws of the United States; that in pursuance of the said resolution the plaintiff's said one hundred shares of the capital stock of the defendant were sold at public auction on the 5th day of May, 1897, at 3:30 p. m. at the banking house of the defendant in the city of Portland, State of Oregon, that at said sale the defendant received for the said one hundred shares of stock the sum of $5000, and no more, and that the whole number of said one hundred shares of stock was the least amount of the said one hundred shares of stock which would make the amount of the assessment thereon.

22

X. Alleges that under and by virtue of the laws of the United States in such cases made and provided and particularly under and by virtue of section 5205 of the Revised Statutes of the United States, the said board of directors was authorized and empowered to pass the said resolution which was passed on the 18th day of March, 1897, as aforesaid, and to make and cause to be made

the said sale which was made on the 5th day of May, 1897, as aforesaid.

23 And for a second, further and separate answer to the said complaint and by way of a separate and distinct defense to the cause of action therein set forth, the defendant alleges as follows:

I. On or about the 11th day of December, 1896, the defendant received from the Comptroller of the Currency a notice which was and is in the words and figures following:

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *Dec. 5th*, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial national bank, Portland, Oregon, has become impaired to an extend which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency.

Now therefore, notice is hereby given to said association under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been re-

24 ceived by it, a receiver will be appointed to close up the business of the association, according to provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington, District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKELS,
Comptroller of the Currency.

To the Commercial national bank, Portland, Oregon.

II. Thereafter, to-wit, on the 14th day of December, 1896, at a regular meeting of the board of directors of the defendant, which has been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which a quorum of the said board was present and voted, the said board of directors passed a resolution which was and is in words and figures following:

Whereas, the board of directors of this bank did, on October 5th 1896, adopt a series of resolutions recommending to the Comptroller of the Currency that he levy an assessment of fifty per cent. upon the capital stock of this bank, in accordance with authority conferred upon him by section 5205 of the Revised Statutes of the United States:

And whereas, in accordance with such recommendation the Comptroller of the Currency has under date of December 5th, 1896, given notice to this association that its capital stock has become impaired to an extent which makes necessary an assessment of $250,000
25 upon the shareholders of the association in order to make good such deficiency.

Therefore be it resolved That in accordance with the notice served upon this association by the Comptroller of the Currency under date of December 5th, 1896, and received by this *ab*nk on the 11th day of December, 1896, an assessment is hereby levied upon the stockholders of this bank on or before March 11th, 1897;

And resolved, That the cashier of this bank be and he hereby is authorized and instructed to serve upon each shareholder of the bank a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail.

III. Thereafter, to-wit on the 17th day of December, 1896, the defendant caused notice in writing of the said resolution to be served upon the plaintiff and upon each and every shareholder of the defendant, and each and every shareholder of the defendant, including the plaintiff, received and had actual notice of the said resolution prior to the 12th day of January, 1897.

IV. That thereafter, to wit, on the 12th day of January, 1897, at a regular meeting of the stockholders of the defendant at which the plaintiff was present and voted, one, R. L. Durham, who was then the vice president and managing officer of the defendant, submitted to the shareholders of the defendant for action by them thereon
26 a report containing a full and complete statement of the facts hereinbefore alleged, to-wit:—the receipt by the defendant of the said notice from the Comptroller of the Currency and the passage by the said board of directors of the said resolution.

V. At the said meeting no protest against the said action of the said board of directors of the defendant in passing the said resolution or in levying the said assessment was made; but on the contrary, the shareholders present at the said meeting, including the plaintiff, unanimously voted that the said report of the said R. L. Durham should be received and placed on file among the official reports of the officers of the defendant and should be spread at length upon the minutes of the said stockholders' meeting.

VI. The plaintiff did not at any time until long after the 5th day of May, 1897, make or enter any protest against the said action of the board of directors in passing the said resolution and in levying the said assessment and did not in any was object to or question the legality, regularity or necessity of the said resolution or of the said assessment, but on the contrary fully and completely acquiesced therein.

VII. The plaintiff failed and neglected to pay the said assessment or any part or portion thereof.

VIII. Thereafter, to-wit:—on the 18th day of March, 1897,
27 at a meeting of the board of directors of the defendant, which had been duly and regularly called, and which was duly and

regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which meeting a quorum of the said board of directors was present and voted, the said board of directors passed a resolution, wherein and whereby the said board voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897, at 3:30 p. m., a sufficient amount of the one hundred shares of the capital stock of the defendant belonging to the plaintiff to make the amount of the assessment upon the one hundred shares of stock, to-wit:—the sum of $5,000. The said board of directors before the said sale caused due and legal notice thereof to be given and published as required by the laws of the United States, in such cases made and provided; and at the time and place specified in the said last mentioned resolution caused to be sold at public auction plaintiff's said one hundred shares of the capital stock of the defendant.

IX. The said board of directors in passing the said resolution which was passed on the 18th day of March, 1897, and in causing the said one hundred shares of stock to be sold, as aforesaid, relied upon the said silence of the plaintiff, at the said meeting of the shareholders of the defendant which was held on the 12th day of January, 1897, and relied upon his acquiescence in, and ratification of, the said resolution passed by the said board of directors on the
28 14th day of December, 1896, and in the assessment therein and thereby levied. The said board of directors would not have passed the said resolution which was passed on the 18th day of March, 1897, as aforesaid, and the said one hundred shares of stock would not have been sold by the said board of directors or by the defendant, to satisfy the said assessment, but for the said silence of the plaintiff and his said acqu-escence in and ratification of the said action of the said board of directors in passing the said resolution on the 14th day of December, 1896, and in levying the said assessment.

After the 14th day of December, 1896, and prior to the 18th day of March, 1897, the plaintiff well knew that the said board of directors of the defendant were relying and would rely upon the said silence of the plaintiff and the other shareholders of the defendant in regard to the said assessment, and upon the said acquiescence therein of the plaintiff and of the shareholders of the defendant, and upon the said ratification by the plaintiff and by the other shareholders of the defendant of the said action of the said board of directors in passing the said resolution which was passed on the 14th day of December, 1896, and in levying the said assessment and well knew that the said board of directors was about to and would, in reliance upon the said silence acquiescence and ratification of the plaintiff and of the other shareholders of
29 the defendant, cause the said one hundred shares of the capital stock of the defendant belonging to the plaintiff to be sold, as aforesaid, to satisfy the said assessment thereon. That plaintiff ought not to be admitted to allege that each

and every act of the defendant herein set forth, was not lawful and proper, and — each and every act of the plaintiff, the plaintiff deliberately and intentionally led the defendant to believe defendant's acts to be lawful and proper and to act upon such belief as herein set forth and deliberately and intentionally acted in all respects as herein set forth in order to lead defendant to rely thereon and to act as herein set forth. By reason of the premises and of the failure of the plaintiff to protest against or object to the said assessment or of the said sale of his said one hundred shares of the capital stock of the defendant.

And for a third, further and separate answer to the said complaint, and by way of a separate answer and distinct defense to the cause of action therein set forth, the defendant alleges as follows:

I. On or about the 11th day of December, 1896, the defendant received from the Comptroller of the Currency a notice which was and is in the words and figures following

TREASURY DEPARTMENT,

30 OFFICE OF THE COMPTROLLER OF THE CURRENCY,

WASHINGTON, D. C., *Dec. 5th*, 1896.

Whereas, it appears to the satisfaction of the Comptroller of the Currency that the capital stock of the Commercial national bank, Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollard ($250,000) upon the shareholders of said association to make good such deficiency.

Now therefore, notice is hereby given to said association under the provision of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKELS,
Comptroller of the Currency

To the Commercial national bank, Portland, Oregon.

31 II. Thereafter, to-wit, on the 14th day of December, 1896, at a regular meeting of the board of directors of the defendant which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which a quorum of the said board was present and voted, the said board of

directors passed a resolution which was and is in the words and figures following:—

Whereas, the board of directors of this bank did, on October 5th, 1896, adopt a series of resolutions recommending to the Comptroller of the Currency that he levy an assessment of fifty per cent. upon the capital stock of this bank, in accordance with authority conferred upon him by section 5205 of the Revised Statutes of the United States;

And whereas, in accordance with such recommendation the Comptroller of the Currency has under date of December 5th, 1896, given notice to this association that its capital stock has become impaired to an extent which makes necessary an assessment of $250,000 upon the shareholders of this association in order to make good such deficiency;

Therefore be it resolved That in accordance with the notice served upon this association by the Comptroller of the Currency under date of December 5th 1896, and received by this bank on the 11th day of December, 1896, an assessment is hereby levied upon the shareholders of this bank of fifty per cent. or $50 per share, pay-
32 able at this bank on or before March 11th, 1897.

And resolved, That the cashier of this bank be and he hereby is authorized and instructed to serve upon each shareholder of the bank a legal notice of the above assessment by sending such notice to each shareholder's address by registered mail.

III. Thereafter, to-wit, on the 17th day of December, 1896, the defendant caused notice in writing of the said resolution to be served upon the plaintiff and upon each and every shareholder of the defendant, and each and every shareholder of the defendant, including the plaintiff, received and had actual notice of the said resolution prior to the 12th day of January, 1897.

IV. That thereafter, to-wit, on the 12th day of January, 1897, at a regular annual meeting of the stockholders of the defendant, at which the plaintiff was present, and voted, one R. L. Durham, who was then the vice president and managing officer of the defendant, submitted to the shareholders of defendant for action by them thereon a report containing a full and complete statement of the facts hereinbefore alleged, to-wit:—the receipt by the defendant of the said notice from the Comptroller of the Currency and the passage by the said board of directors of the said resolution.

33 V. At the said meeting no protest against the said action of the said board of directors of the defendant in passing the said resolution or in levying the said assessment was made; but on the contrary, the shareholders present at the said meeting, including the plaintiff, unanimously voted that the said report of the said R. L. Durham should be received and placed on file among the official reports of the officers of the defendant, and should be spread at length upon the minutes of the said shareholders' meeting.

VI. The plaintiff did not at any time until long after the 5th day of May, 1897, make or enter any protest against the said action of the board of directors in passing the said resolution and in levying

the said assessment and did not in any way object to or question the legality, regularity or necessity of the said resolution, or of the said assessment, but on the contrary fully and completely acquiesced therein.

VII. That plaintiff failed and neglected to pay the said assessment or any part or portion thereof.

VIII. Thereafter, to-wit:—on the 18th day of March, 1897, at a meeting of the board of directors of the defendant, which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant, in the city of Portland, State of Oregon, and at which meeting a quorum of the said board of directors was present and voted, the said board of directors passed a resolution, wherein and whereby the said
34 board voted and determined to cause to be sold at public auction for cash at the banking house of the defendant in the city of Portland, State of Oregon, on the 5th day of May, 1897, at 3:30 p. m., a sufficient amount of the one hundred shares of the capital stock of the defendant belonging to the plaintiff to make the amount of the said assessment upon the said one hundred shares of stock, to-wit: the sum of $5,000. The said board of directors before the said sale caused due and legal notice thereof to be given and published as required by the laws of the United States, in such cases made and provided; and at the time and place specified in the said last mentioned resolution caused to be sold at public auction the plaintiff's said one hundred shares of the capital stock of the defendant.

IX. Thereafter, to-wit: on the 2nd day of October, 1897, at a special meeting of the shareholders of the defendant, which had been duly and regularly called, and which was duly and regularly held at the principal place of business of the defendant in the city of Portland, State of Oregon, and at which shareholders holding more than two-thirds of the capital stock of the defendant were present and voted, there was adopted by the shareholders present at the said meeting a resolution that the defendant should be placed in voluntary liquidation under the provisions of section- 5220 and 5221 of the Revised Statutes of the United States. The said
35 resolution was adopted by the votes of shareholders holding more than two-thirds of the capital stock of the defendant. Thereafter the said board of directors caused notice of the said resolution to be certified under the seal of the defendant to the Comptroller of the Currency and to be published for a period of two months, and also caused notice to be published in the manner provided by law to the effect that the defendant was closing up its affairs, and that its creditors were invited to present their claims against the defendant for payment. Thereafter sundry claims against the defendant were presented for payment pursuant to said notice and all the claims which were so presented for payment were paid. The plaintiff did not at any time prior to the commencement of this action present any claim to or make any demand upon the defendant or notify or inform the defendant that he had or claimed to have any claim

or demand against it. That thereafter, to-wit, on the 13th day of July, 1898, all the assets of the defendant were sold by the defendant to Wells Fargo & Company, a corporation, for the sum of two hundred and fifty thousand dollars ($250,000). At the time of the said sale no claims against the defendant were known to the board of directors of defendant to be outstanding or unpaid, but on the contrary the said board of directors believed and had reason to believe that all claims against the defendant had been paid in full.

Thereafter the said board of directors distributed among the
36 shareholders of the defendant all the proceeds of the said sale of the assets of the defendant.

X. The said board of directors, in distributing among the shareholders of the defendant the said proceeds of the said sale of the assets of the defendant as aforesaid, relied upon the facts that no claims or demands had been presented against the defendant which had not been settled or paid. The said board of directors would not have distributed the said proceeds of the said sale, as aforesaid if it had not been that no claim or demand against the defendant had been presented which had not been paid. The plaintiff had full notice of the said sale of the assets of the defendant and before the said board of directors distributed among the shareholders of the defendant the said proceeds, *the said proceeds* of the said sale as aforesaid, the plaintiff well knew that the said board of directors were about to and would so distribute the said proceeds of the said sale, if no claim or demand against the defendant should be presented before such distribution should take place.

That plaintiff ought not to be admitted to allege that each and every act of the defendant herein set forth was not lawful and proper, and in each and every act of the plaintiff, the plaintiff deliberately and intentionally led the defendant to believe defendant's acts to be lawful and proper and to act upon such belief as herein set forth and deliberately and intentionally acted in all respects as herein set

forth in order to lead defendant to rely thereon and *and* to act
37 as herein set forth. By reason of the premises the plaintiff is estopped from now presenting any claim or demand against the defendant.

Wherefore, having fully answered the plaintiff's complaint, the defendant prays to be hence dismissed with its costs and disbursements taxed against the plaintiff.

PLATT & PLATT,
Attorneys for Defendant.

E. S. PILLSBERRY, *Of Counsel.*

STATE OF OREGON, }
County of Multnomah, } ss:

I, H. G. Hanley, being first duly sworn, depose and say that I am the cashier of the defendant Commercial National Bank of Portland in the above entitled action and that the foregoing answer is true as I verily believe.

H. G. HANLEY.

Subscribed and sworn to before me this 26th day of July, 1899.
[SEAL.] J. D. LEONARD,
Notary for Oregon.

STATE OF OREGON,
County of Multnomah, } ss:

38 I, H. G. Hanley, being first duly sworn depose and say that I am the cashier of defendant bank in the above entitled action, and that the foregoing answer is true, as I verily believe.
[SEAL.] H. G. HANLEY.

Subscribed and sworn to before me this 27 day of June, 1899.
ROBERT PLATT,
Notary Public for the State of Oregon.

STATE OF OREGON,
County of Multnomah, } ss:

Due service of the within answer is hereby accepted, in Multnomah county, Oregon, this 27 day of June 1899 by receiving a copy thereof duly certified to as such, by Robert Treat Platt one if the attorneys for defendant.
THOMAS O'DAY,
Attorney for Plaintiff.

And afterwards, on the 29th day of June, 1899, there was filed in the office of said clerk, a

Demurrer

in words and figures as follows, to-wit:

(Title.)

1st. Comes now the above named plaintiff and demurs to
39 the first further and separate answer of the defendant and to the whole thereof, for the reason that same does not state facts sufficient to constitute a defense to plaintiff's complaint herein.
2d. Plaintiff demurs to the second further and separate answer of the defendant and the whole thereof, for the reason that same does not state facts sufficient to constitute a defense to plaintiff's complaint.
3d. Plaintiff demurs to the third further and separate answer of the defendant and the whole thereof, for the reason that the same does not state facts sufficient to constitute a defense to plaintiff's complaint.
O'DAY & TARPLEY,
Attorneys for Plaintiff.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within demurrer is hereby accepted in Multnomah county, Oregon this 28 day of June 1899, by receiving a copy thereof, duly certified to as such by Thos. O'Day, attorney for plaintiff.

ROBERT T. PLATT,
Of Attorneys for Defendant.

40 And afterwards, on the 29th day of June, 1899, there was filed in the office of said clerk, a

Motion

in words and figures as follows to-wit:—

(Title.)

Comes now the above named plaintiff and moves the court to strike out all the following portions of defendant's answer herein, that is to say:—

1st. Commencing with the word "denies" line 17, page 1, to and inclusive of the word "share" line 11, page 3, for the reason that the same is sham, frivolous, redundant, immaterial and for the further reason that same alleges a conclusion and not a fact.

2d. Commencing with the word "but" line 18, page 3, to and inclusive of the word "assessment" line 32, same page, for like reason as above.

3d. Commencing with the word "but" line 8, page 4, to and inclusive of the word "sale" line 31, same page, for like reason as above.

4th. Commencing with the word "denies" line 32, page 4, to and inclusive of the word "all" line 15, page 5, for like reason as above.

5th. Commencing with the word "alleges" line 17, page 5, to and inclusive of the word "thereon" at or about line 25, page 6,
41 and immediately above VI, page 6, for like reasons as above.

6th. Commencing with the word "alleges" at or about line 27, page 6, to and inclusive of the word "aforesaid" line 1, page 7, for like reason as above.

7th. Commencing with the word "denies" line 15, page 7, to and inclusive of the word "defendant" line 25 page 7, for like reason as above.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 28 day of June, 1899, by receiving a

copy thereof, duly certified to as such by Thos. O'Day attorney for plaintiff.

ROBERT T. PLATT,
Of Attorneys for Defendant.

And afterwards, on Monday the 24th day of July, 1899, the same being the 48th judicial day of the May term of said court, there was rendered and entered the following

42 *Order*

in words and figures as follows, to-wit,

(Title.)

This cause having heretofore come on for hearing on plaintiff's motion to strike out certain parts of defendant's answer, and also upon plaintiff's demurrers to the first, second and third further and separate answers, contained within said answer of defendant, plaintiff appearing by Thomas O'Day, Esq., of his attorneys and defendant appearing by Platt & Platt, its attorneys, and argument having been had, and the court being at this time fully advised, the said motion and each and every part thereof is denied but the said demurrers and each of them are hereby sustained, and the defendant having moved the court for permission to amend the second and third separate answers and defenses by interlining after the period in line 18 of page 18 and after the period in line 29, page 24 thereof, the following paragraph:

"That plaintiff ought not to be admitted to allege that each and every act of defendant herein set forth was not lawful and proper, and in each and every act of the plaintiff, the plaintiff deliberately and intentionally led the defendant to believe defendant's acts to be lawful and proper and to act upon such belief as herein set forth and deliberately and intentionally acted in all respects as herein set forth in order to lead the defendant to rely thereon and to act as herein set forth."

43 It is considered and ordered that the defendant have leave to amend in said two particulars by interlineations of the said paragraph upon attaching to the said answer a verification of said answer as amended, and the said demurrer as filed to said second and third separate answers and defenses shall stand as against said answers and defenses thus amended. And it is further considered and ordered that the demurrers to the said second and third separate answers and defenses as amended shall be and they are hereby sustained.

ARTHUR L. FRAZER, *Judge.*

44 And afterwards, on the 5th day of February, 1900, there was filed in the office of said clerk, a

Stipulation

in words and figures as follows, to-wit:—

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

HENRY WEINHARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 2.

GEORGE H. WILLIAMS, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

GEORGE H. DURHAM, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

CLEVELAND ROCKWELL, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

45 In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

H. C. LEONARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 2.

ELLA C. DURHAM, Administratrix of the Estate of S. A. Durham, Deceased, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 2.

PERRY HINKLE, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiffs above named, all acting by their attorneys of record, O'Day & Tarpley, except plaintiff H. C. Leonard who acts by Nixon & Dolph, his attorneys of record, and the defendant in all said actions appearing by E. S. Pillsbury and Platt & Platt, its attorneys of
46 record; that the case of George H. Williams *versus* Commercial National Bank of Portland, now pending and at issue in department two of said court, and the cause of Henry Weinhard *versus* Commercial National Bank of Portland, now pending and at issue in department one of said court shall be set for trial in their respective departments upon the same day and when so set they shall be tried at the same time by and before the presiding judges in the said departments sitting for said purpose in either of the court rooms of said departments as may suit the convenience of said judges with the same force and effect as though the said trials were conducted separately by and before said judges in their respective departements and the said causes shall be tried without the intervention of a jury or juries and the same are hereby expressly waived by all the parties hereto. All of the evidence produced or received on the said trial shall be considered as offered in each of said causes and shall apply to and govern each of the said judges in arriving at their findings of fact and conclusions of law therein and judgment thereon and thereafter which said findings of fact and conclusions of law and judgment based thereon shall be made and rendered in the respective departments wherein said causes are pending except that such evidence as the defendant may offer in the said cause of George H. Williams *versus* Commercial National Bank of Portland to sustain the second and third separate answers and defenses contained within its answer and such evidence as said plaintiff may offer in relation thereto, shall not be considered by the presiding judge of said department one as no such issues as are raised by said

second and third separate answers of defendant are presented
47 in the case of Henry Weinhard *versus* Commercial National Bank of Portland;

It is further stipulated and agreed that in the remainder of said causes recited in the caption hereto, to-wit, George H. Durham *vs.* Commercial National Bank of Portland, Cleveland Rockwell *vs.* Commercial National Bank of Portland, H. C. Leonard *vs.* Commercial National Bank of Portland, all pending in department one of said court, and Ella C. Durham, as administratrix of the estate of S. A. Durham, deceased, *vs.* Commercial National Bank of Portland, and Perry Hinkle *vs.* Commercial National Bank of Portland, both pending in department two of said court, no further action shall be taken by any of the parties thereto until after final judgment in the court of last resort to which said case of Henry Weinhard *vs.* Commercial National Bank of Portland may be taken or judgment of above entitled court based on such decision by said court of last resort and in as much as a Federal question is involved in such cases, said court of last resort shall be interpreted to mean the Supreme Court of the United States, provided, however, that if either party shall fail to prosecute an appeal or writ of error in time from any decision that mey be rendered in said cause, such failure to so appeal or sue out writ of error shall for the purposes of permitting action in those causes covered by this branch of this stipulation be equivalent to a decision or judgment by the said United States Supreme Court in affirmance.

On such final decision by said Supreme Court of the United States or judgment herein in accordance therewith in said case of Henry Weinhard *versus* Commercial National Bank of Port-
48 land, judgment shall be rendered in each of the said causes covered by this branch of this stipulation in accordance with the legal import and effect of the decision in the said Weinhard case wherein the issues are identical with said cases except as to the number of shares of the capital stock of the defendant involved, but in the event that such decision or judgment in said Weinhard case shall be for said plaintiff, said judgments shall as to this particular follow the allegations of the respective complaints as to the number of shares.

Provided that if said Weinhard shall wilfully and contrary to the wishes of the other plaintiffs whose cases are stayed under the terms of this stipulation, refuse to appeal or sue out a writ of error from any decision adverse to him, then and in that case the decision in said Weinhard case shall not be conclusive on said plaintiffs but the decision of the court of last resort in the case of George H. Williams *versus* Commercial National Bank of Portland upon those issues in said Williams case are presented alike in all the cases recited in the caption hereof shall govern the cases stayed hereunder with like effect as though said Williams case had been originally named herein in the place and stead of said Weinhard case as the case of final decision in which in the court of last resort was to be followed by the respective

departments of the above entitled court, after such decision by said court of last resort has been made.

Provided, that if both said Weinhard and said Williams shall both wilfully and contrary to the wishes of plaintiff, H. C. Leonard, whose case is stayed under the terms of this stipulation, re-
49 fuse to appeal or sue out a writ of error from any decision adverse to them, then and in that case the decision in said Weinhard and Williams cases shall not be conclusive on said plaintiff H. C. Leonard, but any time within sixty days after the time to appeal or sue out a writ of error in said Weinhard and Williams cases shall have elapsed pursuant to said wilful abandonment by said Weinhard and Williams, plaintiff H. C. Leonard may cause a judgment to be entered in his case in department one of the above entitled court in accordance with the original decision and judg-*em*-t in the Weinhard case in said above entitled court and thereafter said case shall proceed in its regular course. Failure to so act within sixty days shall be construed as an adoption of the decision in the Weinhard case from which no appeal or writ of error has been taken and authorize defendant to enter judgment against plaintiff H. C. Leonard so failing to act in department one of the above entitled court in accordance with said Weinhard decisions adopted. The prosecution of either the Weinhard or Williams cases to the court of last resort shall, however, bind plaintiff Leonard as well as the other plaintiffs as hereinbefore provided.

In case of disagreement on the part of said judges as to the admissibility of any testimony offered, the record shall show in which of said causes said testimony is received and in which rejected and the grounds of objection.

This stipulation shall be filed in said case of George H. Williams *versus* Commercial National Bank of Portland and considered as filed in each of the other cases recited in the caption hereof.

50

O'DAY & TARPLEY,
Attorneys for all Plaintiffs Excepting H. C. Leonard.
NIXON & DOLPH,
Attorneys for Plaintiff H. C. Leonard.
E. S. PILLSBURY,
PLATT & PLATT,
Attorneys for Defendant.

And afterwards, on Tuesday the 20th day of February, 1900, the same being the 37th judicial day of the January term of said court, there was rendered and entered the following,

Order

in words and figures as follows, to-wit,

(Title.)

Now at this time, this cause comes on regularly for trial before the court, the parties hereto having stipulated that said cause be
51 tried without the intervention of a jury, plaintiff appearing in person and by O'Day and Tarpley, his attorneys and the defendant by Platt and Platt and E. S. Pillsbury its attorneys,

The court, after hearing the allegations of parties and part of the testimony of witnesses and the time for adjournment having arrived, the further hearing of this cause is continued until to-morrow morning at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on Wednesday, the 21 day of February, 1900, the same being the 38th judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit,

(Title.)

At this time come the same parties and counsel as of yesterday and the trial of this cause is again proceeded with.

After hearing further testimony of witnesses and the hour of adjournment having been reached, the court ordered and this
52 cause is hereby continued until Friday morning at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards on Friday the 23rd day February, 1900, the same being the 39 judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit,

(Title.)

At this time comes the same parties and counsel as of yesterday and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and the hour of adjournment having been reached, the court orders and this cause is hereby continued until to-morrow morning at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

53 And afterwards, on Saturday the 24th day of February, 1900, the same being the 40th judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit,

(Title.)

At this time come the same parties and counsel — of yesterday, and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and the hour of adjournment having been reached, the court orders, and this cause is continued until Monday morning at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on the 26th day of Feb'y 1900, the same being the — judicial day of the Jan'y term of said court, there was rendered and entered the following

Order

in words and figures as follows, to wit,

(Title.)

54 At this time come the same parties and counsel as of Saturday and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and the hour of adjournment having been reached, the court orders and this cause is hereby continued until to-morrow morning at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on Tuesday the 27th day of February, 1900, the same being the 43rd judicial day of the January term, of said court, there was rendered and entered the following,

Order

in words and figures as follows to-wit,

(Title.)

At this time come the same parties and counsel as of yesterday and the trial of this cause is again proceeded with. After hearing further testimony of witnesses and the hour of adjournment having been reached the court orders, and this cause is hereby continued until to-morrow at 9:30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

55 And afterwards, on Wednesday the 28th day of Feb'y, 1900, the same being the — judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit

(Title.)

At this time come the parties and counsel as of yesterday and the trial of this cause is ag-in proceed- with. After hearing further testimony of witnesses, and part of argument of counsel and the hour of adjournment having been reached, the court orders, and this cause is hereby continued until to-morrow morning at 9,30 o'clock.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on Thursday the 1st day of March, 1900, the same being the — judicial day of the January term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit,

(Title.)

56 Come now the same parties and counsel as of yesterday and the trial of this cause is again proceeded with. After hearing the arguments of counsel and the court not being fully advised in the premises takes same under advisement.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on the 24th day of October, 1900, there was filed in the office of said clerk, a

Motion

in words and figures as follows, to-wit,

(Title.)

Comes now the abo*ut* named defendant and moves the court for a rehearing in this cause on that part of the findings of the court, wherein the stock held by plaintiff in the defendant corporation was found to be of the value of twenty dollars per share on the fifth day of May, 1897, and the good will thereof was found to be of the value of ten dollars per share on the fifth day of May, 1897, on the ground and for the reason that the evidence submitted in this cause was insufficient to sustain such findings.

PLATT & PLATT,
Attorneys for Defendant.
E. S. PILLSBURY, *Of Counsel.*

57 STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 23rd day of October, 1900, by receiving a copy thereof duly certified to as such by Robert T. Platt one of the attorneys for defendant.

O'DAY & TARPLEY,
Attorneys for Plaintiff.

And afterwards, on the 2nd day of November, 1900, there was filed in the office of said clerk, a

Motion

in words and figures, as follows to-wit,

(Title.)

Comes now the defendant above named appearing by E. S. Pillsbury and Platt & Platt, its attorneys, and moves and requests the court that in making its findings of facts herein it find separately upon the value of the stock of the defendant on the fifth day of May, 1897, if any it had, and upon the value of the good will of the shares of stock of the defendant on said date if any they had.

E. S. PILLSBURY,
PLATT & PLATT,
Attorneys for Defendant, Commercial National Bank of Portland.

58

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted in Multnomah county, Oregon, this 1st day of Nov. 1900, by receiving a copy thereof duly certified to as such, by Robe-t T. Platt, one of the attorneys for defendant Commercial National Bank of Portland.

O'DAY,
Attorneys for Plaintiff.

And afterwards on Monday the 12th day of November,1900, the same being the 6th judicial day of the November term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit,

(Title.)

Now at this time, by consent of the respective parties the motion of the defendants for a rehearing comes on for hearing.

The court after hearing the arguments of counsel and not being fully advised in the premises takes the same under advisement.

(Signed) ARTHUE L. FRAZER, *Judge.*

59 And afterwards, on Monday, the 12th day of November, 1900, the same being the 6th judicial day of the November term of said court, therr was rendered and entered the following

Order

in words and figures as follows, to-wit

(Title.)

Now at this time by consent of the respective parties the motion to separately state value of stock in the findings of facts comes on for hearing.

The court after hearing the arguments of counsel and not being fully advised in the premises takes the same under advisement.

(Signed) ARTHUR L. FRAZER, *Judge.*

And afterwards, on the 6th day of December, 1900, there was made and filed in the office of said clerk, an

Order

in words and figures ad follows, to-wit,

(Title.)

Be it remembered, that upon the trial of the above entitled cause before the court, the parties hereto having waived a jury, before any findings were signed by the court, the plaintiff filed his motion asking the court for an additional finding to the effect that
60 plaintiff was entitled to interest upon the value of his stock wrongfully converted by defendant from the date of such conversion, but the court refused to make such finding, and decided that the plaintiff was not entitled to any interest, to which refusal and decision the plaintiff at the time duly excepted and his exceptions were allowed and the same are her-by signed and made part of the record in this cause.

Dec. 7th. 1900.

ARTHUR L. FRAZER, *Judge.*

And afterwards, on the 6th day of December, 1900, there *was* filed in the office of said clerk,

Findings of Fact and Conclusions of Law

in words and figures as fol-ows, to-wit,

(Title.)

Findings of fact and conclusions of law.

This cause having duly come on for hearing before the court without the intervention of a jury, the parties hereto by their stipulation in writing filed herein, having expressly waived a jury in this cause and the court having heard the testimony and argument of counsel herein, and being fully advised in the premises, hereby makes and files the following findings of fact and conclusions of law.

Findings of Fact.

61 I. That on the 5th day of May, 1897, the plaintiff herein was the owner and holder of 100 shares of the capital stock of the defendant bank, of the par value of $10,000.00 as alleged in the complaint herein.

II. That on said date the defendant bank wrongfully converted same to its own use and benefit, as alleged in the complaint, and thereby deprived said plaintiff of said stock and the whole thereof, and that said stock on said date was of the actual value of $30.00 per share, being of the total value of $3000.00.

Conclusions of Law.

That said plaintiff is entitled to judgment against said defendant Commercial National Bank of Portland for the sum of three thousand dollars and for his costs and disbursements, taxed at $— and that he have execution therefore.

Dec. 6th. 1900.

ARTHUR L. FRAZER, *Judge.*

And afterwards, on Friday, the 7th day of Dec., 1900, the same being the 27th judicial day of the Nov. term of said court, there was rendered and entered the following

62 *Order*

in words and figures as follows, to-wit:—

(Title.)

Now on this day this cause coming on to be heard and the court having heretofore made and filed findings of fact and conclusions of law in this action to which reference is hereby made,

It is therefore considered by the court that said plaintiff have and recover against said defendant The Commercial National Bank of

Portland the sum of three thousand dollars and his costs and disbursements herein taxed at $26.25, and that he have execution therefor.

It is further ordered that defendant have until Jan'y 15th, 1901, to prepare and file a bill of exceptions.

Dec. 7th. 1900.

ARTHUR L. FRAZER, *Judge.*

63 And afterwards, on the 30th day of April, 1901 there was filed in the office of said clerk, a

Bill of Exceptions

which is in words and figures as follows to-wit:—

In the Circuit Court of the State of Oregon for the County of Multnomah.

Department No. 1.

HENRY WEINHARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

Be it remembered, that this cause came on regularly for trial before the court the — day of —— 1900, the parties hereto having waived a jury, and consented to the trial of the same without a jury, the plaintiff appearing by Thomas O'Day, Esq., his attorney, and the defendant appearing by E. S. Pillsbury and Platt & Platt, its attorneys, and thereupon the following legal proceedings were had, to-wit:

Counsel for plaintiff made a statement as follows:—

"We stand on the pleadings and offer no evidence."

Thereupon the defendant moved the court for a non-suit on the following ground-:—

"1st. That the plaintiffs have introduced no testimony to sustain the affirmative allegations of their complaint; that a distinct
64 issue is tendered as to the value of the property claimed to have been converted and that allegation of value is denied by the allegations of the answer, and thus an issue is tendered and the plaintiffs not having introduced any testimony in support of the affirmative of that issue, they have not made out such a case as would throw the burden of proof on the defendant.

2nd. That in the allegations of the answer the sale and all the proceedings in connection therewith are regular under the provisions of the national bank act, and the property was lawfully and properly sold by the defendant and no conversion took place. We refer to the section of the national bank act which relates to the sale, sec. 5203, Revised Statutes of the United States, and base our motion for non-suit as to that clause upon that section of the statute; and also upon the following sections of the Revised Statutes:

Sec. 5145, sec. 5136, also the following sections:—

5147	5137	5170	5142
5149	5162	5164	5166
5167	5171	5182	5183
5190	5191	5195	5196
5197	5201	5102	5103
5104	5206	5214	5222

also Revised Statutes 5142, as amended by section 1 of an act approved May 1, 1886. That will be found in the supplement of the Revised Statutes; also section 3 of an act approved June 30, 1876, and an act approved July 12th, 1882;

65 Also section 1 of an act approved May 1, 1886, giving the shareholders right to vote on increase of capital stock; also section 2 of the same act; and section 3 of an act approved June 30th, 1876, as amended by an act of August 3rd, 1892; all of these references being made to the statutes of the United States in reference to national banks. I will refer for general reference to the statute as a whole with the substituted amendments."

Counsel for plaintiff thereupon stated as follows:—

"We are willing to risk our position on the proposition that the plaintiff did own at the time of this sale sixty shares of the paid up capital stock."

The court denied the motion for a non-suit and to this ruling of the court, the defendant at the time excepted, which exception was by the court allowed.

Thereupon the cause was submitted to the court upon the testimony and the arguments of counsel, and the court subsequently and on the 2nd day of October, 1900, delivered its opinion in writing, signed by the judge, and the same was filed in said court with the papers in this cause and is as follows:

"GEORGE H. WILLIAMS, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK, Defendant.

Opinion of Court.

This action is brought by plaintiff, a stockholder of the defendant, a national bank, to recover for an alleged conversion of stock
66 in said bank. He claims that he was the owner of 60 shares of such stock of the par value of $6,000.00; that upon October 5th, 1896, the board of directors adopted resolutions requesting the Comptroller of the Currency to call for an assessment of 50% upon the capital stock of the bank in accordance with a provision of the U. S. statutes, under a claim that the capital stock had been impaired; that the comptroller on Dec. 5th gave notice of impairment to an extent which made necessary an assessment of $250,000.00 or 50% assessment on the face value of the said stock; that thereafter the board of directors passed a resolution levying the assessment contemplated.

It is furthermore averred that the action of said board and comptroller was without any authorization of the stockholders; and herein it is claimed was the illegality of the action of such board of directors and the defendant.

Thereafter it is claimed and conceded by defendant a sale *in invitum* was made of plaintiff's said stock for non-payment of the assessment;

The plaintiff asserting its value at such time to have been $6,000.00 asks for a judgment in such sum together with interest from May 5, 1897, the date of the sale.

It is obvious that the subject matter of inquiry arising upon this complaint is as to whether the board of directors may act as was done here without the approval of indeed any action upon the part of the stockholders sustaining such act.

This question was presented to the court by demurrer and decided adversely to defendant's contention.

Thereafter defendant answered and the cause was tried
67 before two judges of the court without the intervention of a jury.

After the determination of the legal questions referred to, the sole matter for the consideration of the court was the amount of value of the plaintiff's shares of stock at the time of the sale aforesaid, the plaintiff claiming that it was worth at least 50% of its face value at such time, aside from the good will, the worth of which should be added thereto; the defendant upon the other ha-d denying that it possessed any value whatever; and to the elucidation of this question much testimony was taken and voluminous briefs have been presented by the respective counsel.

The court has been but little hampered by questions of law, though incidentally to the main issue many cases have been cited, and while agreeing upon some of the main questions involved, the arguments of counsel have taken a wide range as to the method of arriving at this value of the stock.

The opinion of the court is that the value of the shares of stock at the time of a conversion presents the true rule in a case of this nature. How shall this value be reached? No method has been found satisfactory except by a careful examination of the testimony adduced upon each side, computing the worth of the holdings of the bank, etc. and while mathematical accuracy has proved unat-ainable, an endeavor has been made to approach a fair and just valuation by a proper estimate of the worth of such assets as the testimony has reached.

We have been unable to concur with the position of the plaintiff that under any view this stock is shown to have been worth
68 50% on its face value under the circumstances of the sale.

We find no elements of estoppel resulting therefrom, nor do the cases cited by counsel to our minds sustain their contention; at least the weight of authority is upon the other side.

Nor does it appear conclusive that $3,000.00 would be the plain-

tiff's share of the assets sold to Wells Fargo & Co., for $250,000.00 nor that this sale should furnish a final, if any, test of value.

A somewhat acrimonious discussion too, took place as to the *animus* of Wells Fargo & Co.'s conduct and a claim has been asserted that in some way damages should be enhanced through some application of the rules relating to punitive damages; but this view has not met with an hospitable reception at the hands of the court. Not being founded in the opinion of the court upon any correct legal principle its consideration has been rejected.

On the other hand we are unable to subscribe to the views of the defendant's counsel that this stock was valueless nor even that the good will was without value.

It would serve no good purpose to review the large amount of evidence submitted. We are clear from the weight of the evidence as to certain tangible assets that these shares of stock had a value. The witnesses for the defendant have wholly underrated these assets though a correspondingly false enhancement thereof has been made by the other side. Nothing is more difficult than for minds differently constituted to agree upon matters of this kind nor is it an essential impeachment of the honesty or good intentions of witnesses that these differences should exist; they largely result from inherent intellectual idiosyncracies. We are of the opinion that the good will of this bank, if properly nursed and protected, had a value.

69 To announce finally and in short our views without attempting to discuss more fully the evidence, we place the value of the shares of plaintiff's stock at the time of the sale thereof by defendant at the sum of twenty dollars per share without the good will.

If these shares had a value, it must, we think, be obvious that the good will of the bank was of some worth, even though at the moment the business was conducted without profit.

This bank had an established business; the patronage of valued customers, the result of years of work in this community.

This says Judge Story is the "benefit acquired by an establishment beyond the mere value of the capital, stocks, funds or property employed therein, in consequence of the general public patronage and encouragement which it rece-ves from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Story Part'p sec. 99 33 Cal. 624.

We have placed this value at ten dollars per share. These results are necessarily somewhat arbitrary. In the nature of the case such conclusion may not be avoided. But it is a careful and paidstaking consummation of a task which has taxed our energies to the fill, and is in our view, the nearest approach to accuracy attainable in the light in which the questions involved have been presented.

70 This action sounding in tort we find no basis in the claim for interest as this matter is treated under the Oregon statute,

and such claim will be disallowed, before at least the decision of the case.

Let findings be prepared in conformity with the views hereinbefore expressed.

SEARS, *J.*

The foregoing is concurred in by Judge Frazer.

Endorsed: Circuit court Multnomah county Oregon. Geo. H. Williams *v.* Commercial Nat. Bank. Opinion of court. Filed Oct. 2nd, 1900, J. P. Kennedy clerk, by Lansing Stout deputy.

Thereupon before any other or further findings of fact or conclusions of law were singed by the court the defendant filed its written motion asking the court that in making its formal findings of fact, it find separately upon the value of the stock of the defenéant on the 5th day of May, 1897, it any it had, and upon the value of the good will of the shares of stock on said date, if any they had; the court having by its said decision in writing herein found that the intrinsic and appraised value of the assets represented by said shar-s and therefore of said shares was twenty dollars per share, and the court having further found that it followed that as said shares were intrinsically of such value, the good will thereof also had a v-lue placed at the additional sum of ten dollars per share, which said motion to separately find was by the court denied, to which refusal and denial the defendant duly excepted and its exception was allowed;

71 Wherefore the defendant presents this, its bill of exceptions, which having been examined by the court and made to conform to the facts and allowed, is now signed and made a part of the record in this cause, this 30th day of April 1901, as and of *the* January 15th, 1901.

ALFRED F. SEARS, JR., *Judge.*

STATE OF OREGON,
County of Multnomah, } *ss:*

Due service of the within bill is hereby accepted in Multnomah county, Oregon, this 15th day of January, 1901, by receiving a copy thereof duly certified to as such by Harrison G. Platt one of the attorneys for defendant.

THOS. O'DAY,
Of Attorneys for Plaintiff.

72 And afterwards, on the 3rd day of June, 1901, there was filed in the office of the said clerk, a

Notice of Appeal

in words and figures, to-wit

In the Circuit Court of the State of Oregon for Multnomah County.

HENRY WEINHARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Defendant.

To Henry Weinhard, plaintiff, and to O'Day & Tarpley, his attorneys:

You and each of you will please take notice that the defendant, Commercial National Bank of Portland, appeals to the supreme court of the State of Oregon from the judgment given and entered in the above entitled cause on the 7th day of December, 1900, by the circuit court of the State of Oregon for Multnomah county.

PLATT & PLATT,
Attorneys for Defendant.

STATE OF OREGON,
County of Multnomah, } *ss:*

Due service of the within notice is hereby accepted in Multnomah county, Oregon, this 3rd day of June, 1901, by receiving a
73 copy thereof duly certified to as such by Harrison G. Platt one of the attorneys for defendant.

THOS. O'DAY,
Attorney for Plaintiff.

And afterwards, on the 5th day of June, 1901, there was filed in the office of said clerk, an

Undertaking on Appeal

in words and figures, as follows, to-wit,

In the Circuit Court of the State of Oregon for Multnomah County.

HENRY WEINHARD, Plaintiff,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, a Corporation, Defendant.

Whereas, the defendant in the above entitled cause appeals to the supreme court of the State of Oregon, from the judgment made and entered in the above entitled cause on the 7th day of December, 1900, by the above entitled court:

Now therefore, in consideration of the premises and of such appeal, we, the undersigned defendant as principal and R. Lea Barn-s, as surety, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages, costs and disbursements that may be awarded it on the appeal.

COMMERCIAL NATIONAL BANK
OF PORTLAND,
By PLATT & PLATT, *Its Attorneys.*
R. LEA BARNES.

74 STATE OF OREGON, } ss:
County of Multnomah, }

I, R. Lea Barnes, whose name is subscribed to the within undertaking as surety, being duly sworn, say that I am a resident and householder within the State of Oregon, and am not a counselor or attorney at law, sheriff or clerk or other officer of any court, am worth the sum of five hundred dollars over and above all debts and liabilities and exclusive of property exempt from execution.

R. LEA BARNES.

Subscribed and sworn to before me this 4th day of June, 1901.
[SEAL.] HARRISON G. PLATT,
Notary Public for Oregon.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within undertaking on appeal is hereby accepted in Multnomah county, Oregon, this 4th day of June, 1901, by receiving a copy thereof certified to as such by Harrison G. Platt, one of attorneys for defendant.

THOS. O'DAY,
Attorneys for Plaintiff.

75 And afterwards, on the 3rd day of July, 1901, there was filed in the office of the said clerk, a

Stipulation

in words and figures as follows, to-wit:—

(Title.)

It is hereby stipulated and agreed by and between the parties to the above entitled cause, acting by their respective attorneys, that defendant and appellant may have to and including the first day of August, 1901, in which to file transcript on appeal in this cause in the supreme court of the State of Oregon, and it is further stipulated that an order pursuant hereto be entered upon motion of defendant.

THOS. O'DAY,
Attorneys for Plaintiff.
PLATT & PLATT,
Attorney- for Defendant.

And afterwards, on Wednesday the 3rd day of July, 1901, the same being the 48th judicial day of the May term of said court, there was rendered and entered the following

Order

in words and figures as follows, to-wit:—

76 (Title.)

Now at this time based on the stipulation of parties it is ordered that defendant and appellant do have to and including the first day of August, 1901, in which to file transcript on appeal in this cause in the supreme court of the State of Oregon.

(Signed) ARTHUR L. FRAZER, *Judge.*

77 In the Circuit Court of the State of Oregon for the County of Multnomah.

STATE OF OREGON, *County of Multnomah,* } ss:

I, J. P. Kennedy, clerk of the circuit court of the State of Oregon, for the county of Multnomah, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries and bill of exceptions constituting the judgment rool, together with the notice of and undertaking on appeal in the case of Herny Weinhard, plaintiff and respondent, *vs.* Commercial National Bank of Portland, a corporation, defendant and appellant have been by me compared with the originals thereof, and that they are true and correct transcripts of such originals pleadings, papers, orders, journal entries and bill of exceptions and notice of and undertaking on appeal as the same appear of record and on file at my office and in my custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said circuit court the 25th day of July, A. D. 1901.

J. P. KENNEDY, *Clerk,*

[SEAL.] By LANSING STOUT, *Deputy.*

78 In the Circuit Court of the State of Oregon for the County of Multnomah.

HENRY WEINHARD, Plaintiff and Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, a Corporation, Defendant and Appellant.

STATE OF OREGON, *County of Multnomah,* } ss:

I, J. P. Kennedy, clerk of the circuit court of the State of Oregon, for the county of Multnomah, do hereby certify that on the 5th day of June 1901, Commercial National Bank of Portland, a corporation

the defendant and appellant in the above entitled cause, filed its undertaking on appeal, with R. Lea Barnes as surety therein conditioned that the said appellant will pay all damages, costs and disbursements which may be awarded against it on the appeal.

And I further certify that said undertaking is given for an appeal only.

In witness whereof, I have hereunto set my hand and affixed the seal of said circuit court this 25th day of July, A. D. 1901.

[SEAL.] J. P. KENNEDY, *Clerk*,
By LANSING STOUT, *Deputy*.

79 (Endorsed:) In the supreme court of the State of Oregon Appeal from Multnomah county. Henry Weinhard, plaintiff and respondent, *vs.* Commercial National Bank of Portland, defendant and appellant. Transcript. Filed August 1, 1901 J. J. Murphy, clerk. By J. W. Reeves, deputy.

80 HENRY WEINHARD, Respondent,
v.
COMMERCIAL NATIONAL BANK OF PORTLAND, OREGON, Appellant.

GEORGE H. WILLIAMS, Respondent,
v.
COMMERCIAL NATIONAL BANK OF PORTLAND, OREGON, Appellant.

Appeal from Multnomah county.

Hon. Alfred F. Sears, Jr., and Hon. Arthur Frazer, judges.

Thos. O'Day, Geo. H. Durham and Geo. H. Williams, for respondent.

H. G. Platt, for appellant.

Bean, C. J.

Affirmed.

81 Two separate actions were brought by Henry Weinhard and George H. Williams, respectively, to recover the value of certain shares of stock in the defendant corporation alleged to have been wrongfully converted by it. As the same questions are involved in each case, they are here considered together.

The defendant is a banking association, organized under the national bank act. On December 5, 1896, the Comptroller of Currency found that its capital stock had become impaired to an extent which made necessary an assessment of $250,000, and notified the association to pay the deficiency by assessments upon its shareholders *pro rata;* and, if not so paid and the bank should refuse to go into liquidation as provided by law for three months after the receipt of the notice, a receiver would be appointed to close up its business. Upon the receipt of the notice, the directors of the bank held a meeting and levied an assessment upon each shareholder of fifty per cent. or fifty dollars per share, payable on or before March 11, 1897. At the time of such assessment, Weinhard owned one hundred shares of the

capital stock, fully paid up, of the par value of $10,000, and Williams, sixty shares, of the par value of $6,000, likewise fully paid up. They both refused or neglected to pay the assessment levied by the directors, and, on May 5, 1897, their stock was sold at public auction, in pursuance of a resolution of the board, and the bank received on such sale the amount of the assessment. Thereafter these actions were brought to recover the value of the stock sold by the corporation, alleging it to be worth par, on the ground that the assessment was invalid and without authority of law. The plaintiffs recovered judgment in the court below, and the bank appeals.

BEAN, C. J.:

Two questions are presented for our determination on this appeal: First, it is insisted that the court erred in overruling the defendant's motion for a nonsuit, and, second, in holding that under the
82 national bank act the authority to levy assessments upon the shareholders of a bank for the purpose of repairing its capital stock is vested in the shareholders themselves, and not in the directors.

The plaintiffs offered no testimony, as part of their case in chief, tending to show the value of the stock alleged to have been converted by the defendant, and for this reason it is urged that the motion for a nonsuit was well taken. At the time of the sale the bank was a going concern, engaged in the transaction of the ordinary business of a banking association, and it may be presumed, we think, that its stock had some value, at least sufficient to entitle the plaintiff- to a nominal judgment, if their stock had been wrongfully converted. In addition to this it appears from the opinion of the trial court, which is set out in full and made a part of the bill of exceptions, that "much testimony was taken, and voluminous briefs have been presented by the respective counsel" upon the question as to the value of the stock, so it would seem that, if there was error in overruling the motion for a nonsuit, it was subsequently cured.

The other question involves a construction of the national bank act. It provides, in brief, that any number of natural persons, not less than five, may form an association for carrying on the business of banking by executing and filing with the Comptroller of the Currency articles of association and an organization certificate stating certain facts: U. S. Rev. St., §§ 5133, 5134, 5135. Such association thereupon becomes a body corporate, with power, among other things, to elect or appoint directors and, by such directors, to appoint a president, vice-president, cashier, and other officers, etc., to prescribe by-laws, regulating the manner in which its stock shall be transferred, its directors and officers elected or appointed, its general business conducted, and the privileges granted to it by law exercised and enjoyed, and to exercise all such incidental powers as shall be necessary to carry on the business of banking, etc.; *id.*, § 5136.

At least fifty per centum of the capital stock must be paid in
83 before the bank can be authorized by the Comptroller of the Currency to commence business, and the remainder in

monthly installments of at least ten per centum, which fact shall be certified to such officer under oath: *Id.*, §§ 5139, 5140. The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders: *Id.*, § 5145.

The shareholders are individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of the association to the extent of the amount of their stock therein, at its par value, in addition to the amount invested in such shares (*id.*, § 5151), and no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital: *Id.*, § 5204. Section 5205 reads as follows: "Every association which shall not have fully paid up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four."

The assessment and subsequent proceedings in this case were had under the provisions of the section quoted, and the question for our decision is whether, when the Comptroller of the Currency
84 finds that the capital stock of a national bank has been impaired by losses, or otherwise, and notifies the association to make up the deficiency by assessment on its shareholders or a receiver will be appointed, such assessment is to be made by the shareholders or directors of the association. In our opinion, the language of the section plainly implies that, upon receiving such notice, the association may elect to either continue in business by increasing the amount of the investment, or go into voluntary or involuntary liquidation, and, as this question affects the shareholders alone, they, and not the directors, are entitled to determine the course that shall be pursued. The individual liability of the shareholders in a national bank is fixed by statute at the par value of the stock held by each, in addition to the amount invested in such shares, (§ 5151), and does not arise except in case of liquidation and for the purpose of winding up the affairs of the institution. There is no legal obligation on their part to pay an additional assessment necessary to repair the capital stock, unless it is voluntarily authorized by them. Their only obligation, when notice is given by the Comptroller of the Currency of the impairment of the capital stock of the bank, is either to assess themselves and make up the deficiency,

and thus increase their investment, or to go out of business, and we think, the law contemplates that this right shall be exercised by them alone. If they desire and elect to continue in business they must make up the deficiency, but they are, in our opinion, at liberty to take the other alternative and allow the corporation to go into liquidation. The question is a Federal one, and, so far as we are advised, has never been directly passed upon by the Supreme Court of the United States. In *Delano v. Butler*, 118 U. S. 634, the court was called upon to decide whether payments made upon assessments voluntarily levied by the shareholders, under U. S. Rev. St., § 5205, could be applied in the discharge of subsequent assessments made by the comptroller in final liquidation of the bank, under section 5151. It was held that they could
85 not. Mr. Justice Matthews' opinion proceeds on the theory that the assessment contemplated by section 5205 is one to be imposed on the shareholders by their own vote for the purpose of restoring their lost capital as a consideration for the privilege of continuing its business, while, under section 5151, the shareholders may be compelled to discharge their individual responsibility for contracts, debts and engagements of the association. He says: "The assessment as made under section 5205 is voluntary, made by the stockholders themselves, paid into the general funds of the bank as a further investment of the capital stock, and disposed of by its officers in the ordinary course of its business. It may or may not be applied by them to the payment of creditors, and in the ordinary course of business certainly would not be applied, as in cases of liquidation, to the payment of creditors ratably; whereas under section 5151, the individual liability does not arise, except in case of liquidation and for the purpose of winding up the affairs of the bank. The assessment under that section is made by authority of the Comptroller of the Currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably." These remarks are, of course, not authoritative, because they were not necessary to the decision of the case, but they are, nevertheless, very persuasive, and indicate the views of the learned justice, if not the entire court. In *Hulitt v. Bell*, 85 Fed. 98, the circuit court of the United States for the southern district of Ohio, in an able and well-reasoned opinion by Judge Sage, held that an assessment levied by a board of directors of a national bank to make up a deficiency in its capital stock, under sections 5205, was invalid and not within the power of the directors, but should have been made by the shareholders themselves. After referring to the duties and powers of the directors as provided in the bank act, he says: "The assessment in question does not fall within any of these powers. It does
86 not come under the head of incidental powers necessary to carry on the business, nor is it included in the conduct of general business. It is a provisions for a special emergency, so unusual and of such importance as to make it necessary for the association to consider and determine whether it will continue in business or wind up its affairs. The impairment of the capital may have

resulted from inefficiency or incapacity or the fault or wrong of the directors under whose administration of the affairs of the bank it occur-ed. Their holdings of the capital stock may be but a small proportion of the entire amount. They ought not to exercise control over a matter so vital, unless the statute gives it to them in unmistakable terms." It is argued that the opinion of the court upon this point is entitled to but little weight because the case could have been, and was, decided upon another point. The validity of the assessment was directly involved in the case, argued by counsel and considered and passed upon by the court, and, if the opinion of Judge Sage is *dictum* at all, it should, as said by Mr. Justice Cassiday, in *Buchner v. Chicago, M. & N. W. R'y Co.*, 60 Wis. 264, "be regarded as 'judicial *dictum*,' in contradistinction to mere *obiter dictum*." It was not a mere argument or illustration of some collateral question, but was the opinion of the court upon a litigated point in the case, and is entitled to be considered and recognized as such.

The judgment of the court below will therefore be affirmed.

87 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court room in the city of Salem, on the first Monday, the 3rd day of March 1902,

Present: Hon. Robert S. Bean, chief justice, Hon. Frank A. Moore, associate justice, Hon. Charles E. Wolverton, associate justice, and J. J. Murphy, clerk, the following proceedings were had on Saturday the 3rd day of May 1902, the same being the 34th judicial day of said term:

HENRY WEINHARD, Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Appellant.
} Appeal from Multomah County.

This cause having heretofore to-wit:—on the 23rd day of April 1902, been argued and submitted by the attorneys of the respective parties above named and by the court then reserved for further consideration and the court having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon and being now fully advised in the premises finds that there is not error as alleged. It is therefore considered, ordered and adjudged that the judgment in this cause in the court below rendered be and the same hereby is in all things affirmed.

And it appearing that the appellant filed an undertaking for the appeal with R. Lea Barnes as surety therein, it is further ordered and adjudged that the respondent recover of appellant and R. Lea Barnes its said surety, his costs and disbursements in this court upon the appeal allowed and taxed at $45.00.

It is further ordered that the cause be remanded to the said court below and that a judgment be there entered and docketed in accordance herewith.

88 In the Supreme Court of the State of Oregon.

HENRY WEINHARD, Respondent,
vs.
COMMERCIAL NATIONAL BANK OF PORTLAND, Appellant.

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true and complete copy of the record of said action certified to and filed with our said court as the transcript on appeal from the judgment of the circuit court of the State of Oregon for the county of Multnomah from which the said appeal was taken, and is the record and transcript upon which said appeal was heard, and the judgment of our supreme court entered thereon on the 3rd day of May 1902.

I further certify that the foregoing transcript likewise contains a full, true and correct copy of the judgment of our said supreme court upon the said appeal entered on the said 3rd day of May 1902, and a full, true and correct copy of the opinion of the court filed on said 3rd day of May 1902, and upon which said judgment was entered.

I further certify that the petition for a writ of error in said cause and the endorsement thereon: the bond thereon, its approval and endorsements thereon: the order allowing the writ of error: the citation and proof of service endorsed thereon, the assignment of errors, the writ of error, and allowance thereof, all which are attached to the above and foregoing, are the original petition, bond, order, citation, assignment of errors and writ lodged with and now in my office: and I do certify that the above and foregoing are such original papers so lodged and filed with me, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above entitled cause in our said court as the same appears of record and on file in my office.

89

I further certify that the cost of the foregoing return to the writ of error is $36.00 and that said amount was paid by Messrs. Platt & Platt for the plaintiff in error.

In witness whereof, I have hereunto set my hand and the seal of the supreme court of the State of Oregon, at my office in the city of Salem, in said State, this the 22nd day of July 1902.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

Endorsed on cover: File No. 18,640. Oregon supreme court. Term No. 109. Commercial National Bank of Portland, plaintiff in error, *vs.* Henry Weinhard. Filed August 6th, 1902.